

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS**  
**800 K STREET, N.W.**  
**WASHINGTON, D. C. 20001-8002**

DATE ISSUED: October 31, 1996

CASE NO: 94-INA-544

In the Matter of:

**THE WINNERS CIRCLE,**  
Employer

On Behalf of

**MANUEL MARIA LUDIZACA,**  
Alien.

Appearance: William Pryor, Esq., New York, NY  
for the Employer

Before: Huddleston, Vittone, and Wood  
Administrative Law Judges

PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Manuel Maria Ludizaca ("Alien") filed by Employer The Winners Circle ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On June 29, 1993, the Employer filed an application for labor certification to enable the Alien, a national of Ecuador, to fill the position of Italian Specialty Cook at a salary of \$318.85 per week, from 2:00 p.m. to 10:00 p.m. (AF 3, 12). The job duties were:

Prepare, season and cook Italian Speci[a]lty dishes as per menu. Must have knowledge of Italian spices and sauces. Season, garnish and portion foods. Dishes include veal scallopine francaise, cavatelli con broccoli, shrimp francaise.

(AF 12. There was no educational requirement; the experience required was 2 years in the job offered or 2 years experience in the related occupation of "Saladmaker, Italian Restaurant." Special requirements consisted of "Must work Tuesday thru Saturday." (AF 12).

A transmittal from the state agency indicated that good faith efforts to recruit qualified U.S. workers were made but there were no qualified applicants or referrals for the position. The state agency indicated the case appeared to be in order. (AF 27).

On March 10, 1994, the CO issued a Notice of Findings in which she concluded that the application was violative of 20 C.F.R. § 656.21(b)(2) for the following reason:

Employer indicates that the job opening is for a Italian Specialty Cook. Employer requires two years experience in the job opportunity or two years of related experience as a Saladmaker, Italian Restaurant. Pursuant to the Supplement to the Dictionary of Occupational Titles, the normal requirements for the related occupation of Saladmaker is a maximum of six months training and/or experience. Although employer's requirement for two years experience in the job offered meets the Specific Vocational Preparation (SVP) requirement, the related experience requirement of two years exceeds the SVP and is, therefore, excessive and restrictive. (AF 30).

The Employer was asked to reduce the requirements "to the D.O.T. standard" or to document how the requirement arises from business necessity. The CO also requested the Employer to provide a copy of his menu. (AF 30-31).

The Employer provided its rebuttal on March 21, 1994, responding to the CO with the following statement by its owner:

The two years related experience as a saladmaker, although a distinct and different job position enables a job applicant to have acquired the requisite knowledge to be able to make the transition to the Cook position. The saladmaker's experience working in a restaurant kitchen is the subordinate job position below a cook in the job hierarchy of a restaurant. When preparing salads, a saladmaker in an Italian Restaurant utilizes similar ingredients that are contained in the entries [sic] such as pasta, shrimp, broccoli, etc. The different preparations of these ingredients create the distinction between a saladmaker and a cook. Employment in an Italian Restaurant kitchen as a saladmaker educates that individual with the sauces and recipes that a cook utilizes to create the entrees with similar ingredients. Two years exposure in this environment as a saladmaker would render an individual able to perform the job duties of an Italian Specialty Cook.

(AF 36). The Employer also provided a menu. (AF 32-35).

On April 14, 1994, the CO issued a Final Determination denying the application because the Employer had not established business necessity in accordance with 20 C.F.R. § 656.21(b)(2). (AF 37-39).

The Employer requested review of that denial by counsel's letter of April 27, 1994. (AF 45-46). The file was sent to the Board of Alien Labor Certification Appeals.

In a brief filed with the Board, the Employer argues that it has established business necessity for the alternate requirement and the CO's conclusion "defies logic" as well as applicable precedent.

### **DISCUSSION**

In the instant case, the issue before us is whether the alternate experience requirement of two years as a Saladmaker in an Italian Restaurant is unduly restrictive so as to require a showing of business necessity under 20 C.F.R. § 656.21(b)(2). For the reasons set forth below, we find that the alternate experience requirement is expansive and is not unduly restrictive and no showing of business necessity was required.

Section 656.21(b)(2)(i)<sup>1</sup> requires a showing of business necessity for requirements that are not normal for jobs in the United States or that are not defined for the job in the **Dictionary of Occupational Titles**. If the job requirement or duty falls within the D.O.T. then it is not unduly restrictive and no showing of business necessity is required. **See, e.g., Ivy Cheng**, 93-INA-106 (June 28, 1994); **A-Transmission Discount**, 88-INA-118 (March 27, 1990); **Manuel Reyes**, 89-INA-89 (Nov. 29, 1989). Here, either the two-year experience requirement in the job offered or the **alternative** two-year experience requirement in the related occupation of Saladmaker are acceptable as within the specific vocational preparation for the position of Italian Specialty Cook under the **Dictionary of Occupational Titles** and these alternative requirements are thus not unduly restrictive. What the specific vocational preparation is for the position of "Saladmaker" is irrelevant as that is not the job offered here. Thus, no showing of business necessity was required.

As the alternative requirement would expand rather than limit the pool of eligible U.S. applicants, the CO is essentially challenging the requirements as not being sufficiently stringent. In **ERF Inc. d/b/a Bayside Motor Inn**, 89-INA-105 (Feb. 14, 1990), the Board questioned such a challenge, as long as the requirements are relevant to the job offered and the job would be offered to any applicant meeting the requirements. The Board has also held that addition of an alternative requirement may be deemed restrictive rather than expansive when the alternative requirement is tailored to the alien's background and bears no relationship to the job offered. **See Intexmezzo, Inc. t/a Ristorante Portofino**, 94-INA-25 (March 8, 1995) (alternative experience as kitchen helper not shown related to cook position); **see also Tres Amigos Mexican Restaurant**, 94-INA-30 (April 10, 1995) (same). However, we find that the statement by the Employer's owner clearly establishes the relationship of the job of Saladmaker, Italian Restaurant to that of Italian Specialty Cook.

This case is similar to **Mall Foods Trivent, Inc.**, 95-INA-190 (June 12, 1996), which involved the position of Cook and the alternate experience requirement of two years as a Pantry Goods Maker. The CO had argued, as it has here, that the requirement of two years experience in the alternate occupation was below the SVP for that position. We rejected the CO's argument, noting that an alternative experience requirement cannot be unduly restrictive where it is appropriate to, and related to the job, and that the alternate requirement was expansive rather than restrictive. We found that the alternative experience requirement of Pantry Goods Maker involved food preparation and was related to and appropriate to the position of Cook.

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<sup>1</sup> Unless otherwise indicated, section references are to title 20, Code of Federal Regulations.

Here, too, we find that the position of Saladmaker, Italian Restaurant involves food preparation and is related to and appropriate to the position of Italian Specialty Cook. Accordingly, the requirement is not unduly restrictive and the application should have been granted.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby REVERSED and the Certifying Officer is ordered to GRANT labor certification.

For the Panel:

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PAMELA LAKES WOOD  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.